IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RANDALL FELIX SMITH,
Appellant.

No. 2 CA-CR 2013-0166
Filed May 7, 2014

Appeal from the Superior Court in Pima County
No. CR20122221001
The Honorable Richard S. Fields, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By David A. Sullivan, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Randall Smith was convicted of attempted production of marijuana in an amount less than two pounds. The trial court suspended the imposition of sentence and placed Smith on probation for eighteen months. On appeal, Smith argues the court committed reversible error by denying his motion to suppress evidence obtained during an illegal search of his residence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Smith's conviction. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In April 2012, officers assigned to the Counter Narcotics Alliance conducted simultaneous "knock and talks" at Smith's residence (Kahlua residence) and his son's residence (Rincon Mesa residence), which were suspected of "marijuana grow operations." The two residences were located in the same neighborhood.

¶3 At the Rincon Mesa residence, Smith's son opened the door and spoke to the officers. He showed the officers twelve marijuana plants he had growing in his backyard and explained that he had a medical marijuana card.[1] The officers smelled the odor of

[1]Under the Arizona Medical Marijuana Act, a patient with a valid medical marijuana card may legally possess 2.5 ounces of usable marijuana and, if authorized to cultivate, twelve marijuana plants. A.R.S. § 36-2801(1)(a).

marijuana coming from inside the residence, and Smith's son said "he had approximately two grams of marijuana inside." Smith's son also stated that Smith had a medical marijuana card and that Smith "was growing marijuana plants on his property as well."

¶4 At the Kahlua residence, no one answered the door, but a "canine trained and certified in the detection and recognition of the odor of illegal drugs alerted to the residence." As the officers were standing at the door, they heard "a lot of commotion coming from around the side." One of the officers moved to the west side of the residence to see if anyone was there, and, when he did so, he "noticed . . . a darker colored screened-off area and . . . noticed [two or three] marijuana plants growing" inside. Officers on the east side of the residence also "smelled a strong odor of raw marijuana" coming from an air-conditioning unit in a window. The officers contacted Smith on his cellular telephone, and Smith admitted "he was growing marijuana at the residence." When Smith returned home, he showed the officers his medical marijuana card and, despite initially denying that he had any drugs in his residence, acknowledged that "he had something inside."

¶5 The officers applied for search warrants for both residences. The magistrate found probable cause to issue a search warrant for the Rincon Mesa residence but not the Kahlua residence. While executing the warrant at the Rincon Mesa residence, the officers found 190 marijuana plants. During that search, the officers also noticed that the window coverings consisting of "foam insulation and plastic" were similar to the window coverings they had observed at the Kahlua residence.

¶6 During this time, an officer also learned that both men received water to their properties from a well cooperative (co-op). That officer spoke to a neighbor involved in the co-op, who reported that the Rincon Mesa and Kahlua residences used "similar" amounts of water, "far exceed[ing] the amount . . . utilized by the other [residences] on the co-op." Another neighbor confirmed the "excessive water usage" and additionally noted "an excessive amount of water drainage" from the Kahlua residence. The officer who interviewed these neighbors also observed "some drainage from the [Kahlua residence]."

¶7 With this new information, the officers again requested a search warrant for the Kahlua residence. The magistrate determined that there was probable cause and issued the warrant. Officers subsequently found 130 marijuana plants and growing equipment during their search of the Kahlua residence. Smith was charged with attempted production of marijuana in excess of four pounds and possession of drug paraphernalia.

¶8 Before trial, Smith filed a motion to suppress any evidence obtained as a result of the search warrant, arguing that "[t]he analysis of water usage presented by [the officers] . . . for the issuance of the search warrant [wa]s false." He maintained that, after "[s]etting aside the false information concerning water usage[,] the remaining information [wa]s insufficient to establish probable cause for the search warrant." L.O., the "secretary/treasurer of the well co-op," testified at the suppression hearing that co-op members are required to pay a monthly fee of $35 for which "[t]hey get whatever [water] they use." She "d[i]dn't think . . . it [was] possible" to determine how much water each property was using and said she had "never seen an excessive water runoff from [Smith's] property." The trial court denied the motion, finding that, even if it "deduct[ed]" the information about the water usage, "there was still ample [probable cause] for the warrant."

¶9 The jury found Smith guilty of attempted production of marijuana in an amount less than two pounds and acquitted him of possession of drug paraphernalia. The trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶10 The sole issue on appeal is whether the trial court erred by denying Smith's motion to suppress evidence obtained by police officers during the search of his residence. Smith contends the search and, thus, his conviction violates the Fourth Amendment of

the United States Constitution and article II, § 8 of the Arizona Constitution.[2]

¶11 We review the denial of a motion to suppress for an abuse of discretion, *State v. Fikes*, 228 Ariz. 389, ¶ 3, 267 P.3d 1181, 1182 (App. 2011), "considering only the evidence presented at the suppression hearing," *State v. Schinzel*, 202 Ariz. 375, ¶ 12, 45 P.3d 1224, 1227 (App. 2002). We view this evidence in the light most favorable to upholding the trial court's ruling, "[b]ut we review the court's legal conclusions de novo." *State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007). We will affirm the trial court's ruling if it was legally correct for any reason. *State v. Childress*, 222 Ariz. 334, ¶ 9, 214 P.3d 422, 426 (App. 2009).

¶12 The Fourth Amendment protects against unreasonable searches and seizures and requires that a search warrant be supported by probable cause, that is, based on the totality of the circumstances, "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Arizona law provides similar protections. *See* Ariz. Const. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); A.R.S. § 13-3913 ("No search warrant shall be issued except on probable cause, supported by affidavit . . . ."). As a result, we have "consistently applied the Fourth Amendment's 'legitimate expectation of privacy' requirement when determining unlawful search or seizure claims made pursuant to Article 2, Section 8."[3] *State v. Juarez*, 203 Ariz. 441,

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[2]Smith also maintains that his conviction violates article II, § 24 of the Arizona Constitution. But he offers no separate explanation for the applicability of this constitutional provision. We therefore do not address it further.

[3]"[I]n cases involving 'unlawful' warrantless home entries," article II, § 8 has been construed as granting "broader protections" than the Fourth Amendment. *State v. Juarez*, 203 Ariz. 441, ¶ 14, 55 P.3d 784, 787-88 (App. 2002). Smith has not argued that this case is one in which the Arizona Constitution grants broader protections. And, we find those cases involving broader protections distinguishable from Smith's. *See State v. Ault*, 150 Ariz. 459, 466,

¶ 16, 55 P.3d 784, 788 (App. 2002). When a violation of the Fourth Amendment occurs, "the exclusionary rule generally requires the suppression at trial of any evidence directly or indirectly gained as a result of the violation." *State v. Allen*, 216 Ariz. 320, ¶ 9, 166 P.3d 111, 114 (App. 2007).

¶13 Smith first argues the trial court erred in denying his motion to suppress because the evidence of excessive water usage and drainage was "unverified and nonsensical." He argues "[t]here was no way of measuring [his] use of the water" and "there was a wash running around [his] property which would easily account for any water drainage." Without this evidence, he maintains, "there was no legitimate basis upon which police could have obtained a search warrant for [his] property."

¶14 In determining whether there is probable cause to support a search warrant, a magistrate must consider the totality of the circumstances. *State v. Buccini*, 167 Ariz. 550, 556, 810 P.2d 178, 184 (1991), *citing Gates*, 462 U.S. at 238. Probable cause exists "if a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with criminal activity and that they would be found at the place to be searched." *State v. Carter*, 145 Ariz. 101, 110, 700 P.2d 488, 497 (1985). On appeal, we give deference to the magistrate's decision and "presume a search warrant is valid; it is the defendant's burden to prove otherwise." *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d 618, 621 (App. 2002).

¶15 Generally, when police informants provide information contained in a search warrant affidavit, the magistrate must "make a practical, common-sense decision whether, given all the

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724 P.2d 545, 552 (1986) (inevitable discovery doctrine not applicable to evidence produced by illegal search even if it would have been found inevitably); *State v. Bolt*, 142 Ariz. 260, 265, 689 P.2d 519, 524 (1984) (officers violated state constitution when they entered home without warrant, inspected premises, and held everyone until warrant obtained). We therefore apply Fourth Amendment jurisprudence here.

circumstances set forth in the affidavit . . . , including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. An anonymous caller reporting a crime, however, is entitled to a greater measure of credibility. *State v. Turney*, 134 Ariz. 238, 241, 655 P.2d 358, 361 (App. 1982); *State v. Stanhope*, 139 Ariz. 88, 91, 676 P.2d 1146, 1149 (App. 1984). "Unlike the usual police informant who frequently seeks some favor from the police in return for his information, the silent witness generally wants nothing in return for his or her tip." *State v. Summerlin*, 138 Ariz. 426, 431, 675 P.2d 686, 691 (1983). Accordingly, "[a]bsent other evidence as to the corrupt motive of the anonymous caller, such an informant is considered reliable and credible." *Id.*

¶16 Here, to obtain the search warrant, the officers relied on information provided by two of Smith's neighbors regarding his excessive water usage and drainage. Nothing in the record suggests they were seeking any benefit for providing the information. Rather, they were merely sharing their observations with the officer. Thus, the neighbors are more akin to anonymous callers than police informants. There was nothing in the record that established or suggested the neighbors were not "reliable and credible." *Id.*; *cf. State v. Collins*, 21 Ariz. App. 575, 578-79, 522 P.2d 40, 43-44 (1974) (confidential telephone calls by private citizens properly used in issuance of search warrant).

¶17 Additionally, although L.O.'s testimony at the suppression hearing conflicted with the information provided by the neighbors, the trial court was not required to credit L.O's testimony. Notably, L.O. admitted that "it's possible" other neighbors had seen "some things, usage and draining on that property, that [she] didn't." We conclude Smith has not met his burden of establishing the search warrant was invalid. *See Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d at 621. The trial court therefore did not abuse its discretion by denying Smith's motion to suppress. *See Fikes*, 228 Ariz. 389, ¶ 3, 267 P.3d at 1182.

¶18 For the first time on appeal, Smith asserts two additional reasons "[his] conviction was predicated upon an illegal

search of his residence." First, he contends the dog sniff of his residence during the "knock and talk" was an illegal search. Second, he claims the officers' conduct during the "knock and talk" amounted to an illegal search of the curtilage of his home. Because he did not present these arguments below, Smith has forfeited review absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *State v. Newell*, 212 Ariz. 389, ¶ 34, 132 P.3d 833, 842 (2006) (reviewing suppression argument raised for first time on appeal for fundamental error).

¶19 First, relying on *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409 (2013), Smith argues that the "use of the drug-sniffing dog" constituted a search in violation of his constitutional rights. In *Jardines*, the Supreme Court had to determine whether "using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." ___ U.S. at ___, 133 S. Ct. at 1413. There, Florida officers had received a tip that marijuana was being grown at Jardines's home. *Id.* One month later, officers surveilled the home for approximately fifteen minutes, saw no activity, and approached the home with a drug-sniffing dog. *Id.* The dog signaled the presence of narcotics, and the officers applied for and received a warrant to search the home. *Id.* "[T]he search revealed marijuana plants, and [Jardines] was charged with trafficking in cannabis." *Id.* Jardines moved to suppress the marijuana plants because "the canine investigation was an unreasonable search." *Id.* The trial court granted the motion, and the Supreme Court affirmed. *Id.* at ___, 133 S. Ct. at 1413, 1418.

¶20 The Supreme Court began its analysis by recognizing that the area immediately surrounding a home—the curtilage—is "'part of the home itself for Fourth Amendment purposes.'" *Id.* at ___, 133 S. Ct. at 1414, *quoting Oliver v. United States*, 466 U.S. 170, 180 (1984). It went on to acknowledge that an officer may approach a home and knock without a warrant because a private citizen may do so. *Id.* at ___, 133 S. Ct. at 1415. But, the Court noted that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else." *Id.* at ___, 133 S. Ct. at 1416. The Court explained that "the

background social norms that invite a visitor to the front door do not invite him there to conduct a search." *Id.* The Court thus concluded that the "use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Id.* at ___, 133 S. Ct. at 1417-18.

¶21 Based on *Jardines*, we agree with Smith that the dog sniff of his residence during the knock and talk constituted a search.[4] As such, it could not provide probable cause for the search warrant. *See id.* at ___, 133 S. Ct. at 1413. However, Smith has failed to prove fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 ("To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.").

¶22 Drug-detection dogs "disclose[] only the presence or absence of narcotics." *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). According to the affidavit in this case, the dog "alerted to the residence," signaling the presence of marijuana. But the officers had other, legally obtained information that suggested that Smith had marijuana at his residence. Smith's son had told officers that Smith "was growing marijuana plants on his property." And, Smith himself admitted that "he was growing marijuana at the residence," even saying "he had something inside." Because the officers included this other information in the affidavit for the search warrant, Smith has failed to demonstrate any prejudice stemming from consideration of the dog sniff. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶23 Second, Smith maintains that the officers conducted "a warrantless illegal search of the curtilage" when they "trespass[ed] onto [his] property away from the front porch area" and, subsequently, saw marijuana plants in the backyard, smelled marijuana coming from inside the house, and observed his window

[4] *Jardines* was decided approximately one month after the suppression hearing and the trial in this case. We nevertheless assume that *Jardines* applies here and do not determine its retroactivity.

coverings. He seems to be arguing that the reasoning in *Jardines* should be extended to the officers' encroaching on the curtilage of the residence. However, unlike with his dog-sniff argument, which involved a predominantly legal question, fundamental error review of this issue is made impossible by Smith's failure to raise it below. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶24 "Determining whether an area is within a home's curtilage is a fact-intensive inquiry." *United States v. Depew*, 210 F.3d 1061, 1067 (9th Cir. 2000). The curtilage of a residence is entitled to Fourth Amendment protection, *see Jardines*, ___ U.S. at ___, 133 S. Ct. at 1414, but officers are nonetheless entitled to enter the curtilage if it is an "area commonly accessed by visitors," *State v. Blakley*, 226 Ariz. 25, ¶ 17, 243 P.3d 628, 633 (App. 2010). Thus, evidence describing a residence and the areas used by visitors is necessary to resolve curtilage issues on appeal. *See United States v. Dunn*, 480 U.S. 294, 300 (1987) (describing factors to use in defining curtilage); *see also State v. West*, 176 Ariz. 432, 440, 862 P.2d 192, 200 (1993) ("In fact-intensive inquiries on motions to suppress, th[is] court is not obliged to consider new theories . . . ."), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, n.7, 961 P.2d 1006, 1012 n.7 (1998); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988) ("It is particularly inappropriate to consider an issue for the first time on appeal where the issue is a fact-intensive one.").

¶25 As we stated above, in reviewing a ruling on a motion to suppress, this court considers only the evidence that was presented at the suppression hearing, *Schinzel*, 202 Ariz. 375, ¶ 12, 45 P.3d at 1227, which we view in the light most favorable to upholding the trial court's ruling, *Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d at 796. Because Smith did not raise his curtilage argument below, the parties never presented testimony on this issue at the suppression hearing, and the trial court made no findings related to it. We cannot say with any certainty what evidence might have been adduced had this issue been raised. *See Brita*, 158 Ariz. at 124, 761 P.2d at 1028 (had issue raised on appeal been presented below, suppression hearing "might well have taken a decidedly different twist"). Even the trial testimony, which Smith cites in support of his

argument on appeal, is unclear as to the layout of Smith's property and the areas open to visitors.

¶26 Given the lack of testimony about this issue, the record is "wholly inadequate" to address it on appeal. *State v. Estrella*, 230 Ariz. 401, n.1, 286 P.3d 150, 153 n.1 (App. 2012) (finding waiver of search argument particularly appropriate in context of motion to suppress). Therefore, Smith cannot meet his burden of establishing fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Disposition

¶27 For the foregoing reasons, we affirm the conviction and sentence.